Statement of the case.

It is hardly necessary to add that the act of the legislature of April 12th, 1851, empowering the Hemphill Railroad Company to borrow money and pledge its property and income to secure the payment thereof, cannot be regarded as exempting that company from the operation of the resolution of 1843.

JUDGMENT REVERSED, and a

VENIRE DE NOVO AWARDED.

RAILWAY COMPANY v. MCSHANE ET AL.

1. The *Railway Company* v. *Prescott* (16 Wallace, 603) modified and overruled so far as it asserts the contingent right of pre-emption in lands granted to the Pacific Railroad Company, to constitute an exemption of those lands from State taxation.
2. But affirmed so far as it holds that lands, on which the costs of survey have not been paid, and for which the United States have not issued a patent to the company, are exempt from State taxation.
3. Where, however, the government has issued the patent, the lands are taxable, whether payment of those costs have been made to the United States or not.

APPEALS from the Circuit Court of the United States for the District of Nebraska; in which court the Union Pacific Railroad Company filed a bill to enjoin one McShane and other persons, severally treasurers of different counties in the said State, through which the road ran, and in which it had lands, from the collection of taxes assessed upon them. There were also cross-bills.

The case was thus:

An act of July 1st, 1862, creating the Union Pacific Railroad, enacted*—

"SECTION 3. That there is hereby granted to the said company for the purpose of aiding in the construction of said railroad . . . and to secure the safe and speedy transportation of

* 12 Stat. at Large, 489.

the mails, troops, munitions of war, and public stores thereon, every alternate section of public land . . . designated by odd numbers, to the amount of *five* alternate sections per mile on each side of said railroad, on the line thereof and within the limit of *ten* miles on said road, not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed. . . .

"*And all such lands so granted . . . which shall not be sold or disposed of by said company within three years after the entire road shall have been completed, shall be subject to settlement and pre-emption, like other lands, at a price not exceeding* $1.25 *per acre, to be paid to said company.*"

The statute went on to enact that whenever the company should have completed forty consecutive miles of any portion of its road, ready for the service contemplated by the act, and supplied with all the appurtenances of a first-class road, the President of the United States should appoint three commissioners to examine it and report to him in relation thereto; and if it should appear that forty consecutive miles had been properly completed, then, patents were to issue "conveying *the right and title*" to the lands to the company on each side of the road as far as the same should be completed to the amount aforesaid; and patents in like manner were to issue as each forty miles of road were completed.

An act of July 2d, 1864, amendatory of this act, after authorizing the company, on the completion of each section of its road, to issue first mortgage bonds on the same to an amount designated, and extending the grant for *twenty* miles on each side of said road, enacted:*

"SECTION 21. That *before* any land granted by this act shall be *conveyed* to the said company or party entitled thereto . . . there shall *first be paid* into the Treasury of the United States, the *cost of surveying, selecting, and conveying the same,* by the said company or party in interest, *as the titles shall be required by said company.*"

* 13 Id. 356.

Statement of the case.

In the case of *Railway Company* v. *Prescott*,* this act was interpreted by this court, upon some clauses not necessary to be here quoted, as making the costs of surveying attach to *all* the lands granted to the road, whether by the original act of 1862, or by the amendatory act, just quoted, of 1864.

The work of constructing the road was begun in 1865. In 1867 the company, "for the purpose of raising money to aid in the construction," mortgaged its lands to secure the payment of $10,000,000. The terms of the mortgage required the trustees, upon payment of the bonds, to reconvey the residue of the unsold lands to the company. It reserved to the company the exclusive control and management of the lands, with power to sell the same; the purchase-money, however, to be paid to the trustees before a conveyance was made. The holder of bonds under the mortgage might purchase lands and pay for them in bonds. Both company and trustees were to join in any conveyance in order to make a title.

By the 1st of April, 1869, a road capable of being safely and speedily travelled on, though susceptible still of many obviously desirable improvements, was practically completed.

On the 10th of that same month, some allegations having been made, that certain subsidies granted by the United States to the company in government bonds, to aid in building the road, had not been applied in the exact way designed by Congress, in the acts granting them, and so as to make the road one absolutely of the "first class," a joint resolution was passed, by which it was resolved that to ascertain the condition of the road, the President should appoint a commission of five eminent citizens to examine into the matter and report upon the condition of the road, and to report also what sum, if any, would be required to complete it as a first-class road, such as was contemplated by the acts of Congress. A commission of five eminent citizens was accordingly appointed.

* 16 Wallace, 603.

However, the commissioners whom the act of 1862 had directed to decide whether the road was properly built and in pursuance of the acts authorizing it, having certified that it was so built, the President accepted it May 10th, 1869.

The commission of eminent citizens afterwards reported that while the road was in its then state a good and reliable means of communication, well equipped and prepared to carry passengers and freight with safety and dispatch, yet to make it a first-class road within their construction of the act of Congress, would in their judgment require an expenditure of $1,500,000 more than had as yet been laid out on it.

The joint resolution, just above mentioned, by its third section had

"*Resolved*, That the President is hereby authorized to withhold from said company an amount of subsidy bonds, sufficient to secure the *full* completion *as a first-class road*, of all sections of such road, 'or in lieu of such bonds he may receive as such security an equal amount of the first mortgage bonds of such company.'"

The section enacted further, that in case it appeared to the President that the amount of subsidy bonds yet to be issued was insufficient to secure the full completion of the road, requisition should be made on the company for enough subsidy bonds, or enough of its own first mortgage bonds, to secure full completion, and in default of obtaining such security, that measures should be taken "to compel the giving of it, and thereby, or in any manner otherwise, to protect the interest of the United States in said road, and to insure the completion thereof as a first-class road, as required by law and the statutes in that case made."

As to the status of the lands now assessed, it appeared that at the date of the levy and assessment of the tax in question, the company had dealt with the lands, and was now dealing with them as if they were in all respects their absolute property. They had mortgaged them, as we have already stated; were now advertising and selling them.

They did not recognize the right of the public to settle upon or pre-empt, and to buy them at $1.25 per acre. On the other hand, neither Congress nor the Interior Department had taken any steps to subject the lands to settlement and pre-emption.

Upon the report of the committee of "eminent citizens," under the joint resolution, already mentioned, of April 10th, 1869, that $1,500,000 would be required for supplying deficiencies in the road, the Secretary of the Interior, November 3d, 1869, to indemnify the government, ordered that only one-half the lands to which the company would otherwise be entitled should be patented, and that patents for the rest be suspended until further direction from the Department. Accordingly, in February, 1871, a patent issued to the company under this order for about 640,000 acres of land, half the quantity of the land; the Department refusing to issue a patent for the other half. And so the matter now stood; that is to say, patents for one-half of the company's land were still withheld as security for the completion of its road in matters reported as not up to the required standard.

It also appeared that of the lands situated within the ten-mile limit, every alternate odd section which the company claimed had been patented previous to the assessment and levy of the tax, that the residue of the grants within like limits was unpatented, and that the costs of surveying had not been paid on any lands situated within the ten-mile limit, whether patented or unpatented, because (as was stated by the land agent of the company) not required by the Interior Department.

In respect to the lands situated between the ten and twenty-mile limits, it appeared that they had all been selected, listed, certified, and that the land-office fees and costs of surveying had been paid, and every alternate odd section of those claimed by the company patented, the residue being unpatented.

In this state of things, the company, in July, 1873, filed the present bill. It alleged that in 1872 the assessors of the several counties where the lands were situated (which lands

were described in lists filed as exhibits with the bill), assessed them, and that the boards of commissioners of the same counties levied taxes for State, school, and local municipal purposes upon them, and that the defendants, the treasurers of these counties, were about to proceed to the collection of those taxes by seizing and selling the locomotives, cars, and rolling stock generally of the company, with other personal property. The bill alleged further, that the lands were not liable to any State taxation at the time of the assessment or levy, and it prayed that these treasurers might be enjoined from further proceedings for the collection of them.

The grounds on which this exemption was claimed may be divided into three distinct propositions, some of which were applicable to all the lands and others to only part of them.

1. That by the third section of the act of 1862, under which the company was organized, and by which the lands within the ten-mile limit were granted in aid of the construction of the road, it was provided that all such lands as should not be sold within three years after the entire road shall have been completed, shall be subject to settlement and pre-emption like other lands, at a price not to exceed $1.25 per acre, to be paid to the company. And it was alleged that these lands were liable to this pre-emption, which would be defeated by a sale of them for the taxes.

2. That by the amendatory act of 1864, which extended the grant to twenty miles on each side of the road, it was provided that before any of the land granted should be conveyed to the company, there should first be paid into the Treasury of the United States the cost of surveying, selecting, and conveying the same by the said company, and that these costs not having been paid, a sale for taxes would defeat the right of the United States to enforce this claim and recover their expenses out of the lands.

3. That under the joint resolution of April 10th, 1869, authorizing the President to appoint a commission to inquire into the manner in which the road had been constructed, and, if the report was unfavorable, to take steps to secure

its proper construction, the secretary had refused to issue patents for these lands, withholding the title as security for the performance of what was required in that respect.

The first two of the above grounds on which an injunction against the taxing was sought, were based upon what the complainants conceived was adjudged in *Railway Company* v. *Prescott*,* it having been there adjudged as they argued:

1st. That, whether patented or not patented, the lands were not subject to taxation of the contingent right in the United States of offering them to actual settlers at $1.25 per acre, in case the company did not sell the same within three years from the completion of the road; this objection being based upon the closing part (italicized) of section three of the act of 1862, *supra*, p. 445.

2d. That the right of the State did not, according to the language of the syllabus in that case, attach "until the right to the patent was complete and the requisite title was fully vested in the party without anything more to be paid, or any act to be done going to the foundation of the right," and accordingly that prepayment by the company of the cost of surveying, selecting, and conveying the lands granted, being required by statute making the grant, before any of the lands "shall be conveyed," no title vested, even to the patented tracts, unless the required prepayment had been made.

It was contended on the other side, and in behalf of the right to tax, that *Railway Company* v. *Prescott* was unlike this case, since here—

1. The company had mortgaged the lands in anticipation of a completion of the road; and applied the money received to building the road; that this was a "disposition" of the lands within the act of 1862, though it might not be a "sale" within the meaning of the same act.

2. The company had received patents for half of the land.

3. The company had paid surveying fees on all unpatented

* 16 Wallace, 603.

Statement of the case.

lands in the grant of 1864, and were ready to pay them on the grant of 1862, and had not paid them on it only because they were not asked for.

The court below, while it confessed to some difficulty in distinguishing the case of *Railway Company* v. *Prescott*, on either of the two points just stated, from the one now before the court, was still of opinion that the authority of that case might, as to the first point above mentioned, be escaped from, so far at least as regarded the lands which the company held by patent. After observing that it would not say whether a mortgage of the land was such a "disposition" as would prevent the right of settlement or pre-emption, it remarked that in *Railway Company* v. *Prescott* the taxes were assessed before any patent was issued, and, in addition, that the cost of surveying had not been paid. The learned judge, in this connection said:

"I am inclined to consider the true meaning and effect of the provision in question to be this: While the road is being constructed and for a period of three years after the completion of the entire line, the company may sell or dispose of the lands at their own price, and they are subject during this period to no right of settlement or pre-emption; after the three years have elapsed, the company may still sell or dispose of their lands in good faith, but as to any lands not thus sold or disposed of, there is a right on the part of the public to settle upon and pre-empt them in the same manner as if they were part of the public domain; the price, not exceeding $1.25 per acre, being payable to the company instead of the government.

"If this be a correct view of section three of the act of 1862, it results that the lands of the company, so far as they are patented, are subject to taxation by the authority of the State, and this privilege reserved in favor of the actual settler, and of which he may never wish to avail himself, which is contingent in its nature and subject to be defeated by a sale of the lands by the company, is not inconsistent with, and will not defeat, the rightful authority of the State to tax the lands."

On the second ground of exemption set up, he said:

"This ground of exemption, in view of the decision in the

Prescott case, may be disposed of briefly. Upon the proofs in this case, I am of opinion that lands which have not been patented, either because the costs of surveying required by section twenty-one of the act of 1864 have not been paid, or because patents have been withheld by the Interior Department as indemnity to make good the deficiencies in the construction of the road, are not taxable, and to this extent the injunction will be continued in force. But as to all lands which have actullay been patented to the company, the injunction will be dissolved. It is true that, as respects the patented lands within the ten-mile limits, the land agent of the company states that the surveying fees have not been paid, but he also states that the reason why they were not paid was that the Interior Department did not require it.

"It does not appear that there are any lands not patented which have been fully earned and set apart to the company upon which all fees have been paid, and for which the patents are not retained by the government for its own security, and therefore, for all practical purposes, I hold that the lands in this case may, upon the proofs before the court, be divided into two classes: 1st, those which are patented and which are taxable; 2d, those which have not been patented and which are not shown to be taxable."

The court below accordingly decreed a dismissal of the bill as to all lands embraced in the company's patent of February 23d, 1871, and an injunction as to the lands which had not been patented to the company.

From that decree both parties appealed; the company, because any of its lands were allowed to be taxed; the county-treasurer, McShane, because they were not all taxed.

Mr. A. J. Poppleton, for the railroad company:

The lands which have been taxed in this case are situated in the same way as were those in *Railway Company* v. *Prescott.* Both bodies of lands were granted under the same acts of Congress, to be used in the same way, to be held by the same tenure, and upon similar conditions. The rule laid down in the case just mentioned must, therefore, govern this case.

Argument against the right to tax.

That *all* lands in this case which are unpatented, and upon which *the costs of surveying have not been paid*, or patents to which are withheld by the government as security for a completion of the road, according to the standard fixed by its charter, are within the rule laid down in the case just quoted, and, therefore, are not subject to State taxation, seems to us too plain for argument. They are clearly within the *first* ground assigned in that case for non-taxability.

In respect to all the patented lands in this case, the exemption rests solely, we admit, upon the second ground laid down in the same case, to wit, upon "*the contingent right* (in the government) *of offering the land to actual settlers at the minimum price asked by the government for its lands.*" But we insist that this ground, in the present case, is sufficient and conclusive. It also operates upon both classes of lands.

Does this ground of exemption operate upon the patented lands? The court below, though laboring hard to come to such a conclusion, held that in respect to patented lands, the case of *Railway Company* v. *Prescott* did not, of necessity, control this.

The real question is, therefore, what is the principle of exemption thus laid down by this court in the case of *Railway Company* v. *Prescott*, and from which the court below sought to extricate the present case? Does it apply less to patented than unpatented lands? As to one part, failure of the *company* to perform all conditions precedent to a perfect right to a patent, exempts from taxation; in the other, an interest or a right of the *United States* in the lands, operates as an exemption. The first is referable to the conduct and interests of the company; the second to the rights of the government.

Is this right of the United States any less worthy of preservation after patent issued than before? Is it cut off by the issue of a patent? If worthy of preservation at any stage, what limit can be assigned except the limit of its existence in the United States. Unless the interest of the United States was erroneously protected in the *Railway Company* v. *Prescott* (a matter not to be supposed), these lands

must be held exempt, on the ground of the contingent right in the government of offering the lands at a minimum price. This contingent right of the United States cannot be cut off by the issue of a patent, for the following reasons:

1. No patent issued under the act could convey a greater or better title than is authorized by it. The patent being merely the evidence of the title granted by the acts of Congress, nothing inserted in it by the officers charged with the administration of the grant could enlarge it.

2. To hold that this "contingent right of offering the land to actual settlers at the minimum price asked by the government for its lands," is extinguished by the issue of the patent, is to nullify the right which this provision was framed to create and protect.

Nothing can defeat the operation of the second ground of exemption upon both classes of lands, except proof that the lands have been "sold or disposed of," by the company, as provided in section third, act July 1st, 1862. It does not relieve the question to show that the road was completed in 1869. For, in that case, the right of the United States to require the sale of the lands at $1.25 per acre, has ceased to be contingent, and become absolute.

Messrs. Clinton Briggs and J. C. Cowin, for the treasurer, McShane:

I. The company insists that the three years pre-emption clause, contained in the third section of the act of 1862, defeats the right to tax, and relies on *Railway Company* v. *Prescott*. But, assuming—and this is but for the sake of argument—that the court below did not put the right construction on that rather unintelligible section, still the case relied on by the other side does not control this one.

By the terms of the act of 1862, the right to settlement and pre-emption is to exist only in case that the lands are not "sold or disposed of" within three years after the entire road shall have been completed. The lands need not be "*sold*" within the three years. It is enough that they be

"disposed of." When they were mortgaged they were "disposed of," even if they were not "sold." The road was completed, really, in May, 1869. These lands were mortgaged in 1867. They were, in fact, already disposed of when the road was completed. They were disposed of in 1867, two years before a title to them existed in the company. When, however, a title was obtained by the company in virtue of the completion of their road, that title inured to the mortgagees, on the well-known principle of "estoppel." The mortgagees, therefore, immediately on the completion of the road—and, of course, within the required three years—held a valid mortgage.

This mortgage was for an immense amount, $10,000,000. The bill does not allege that the lands had any value above the mortgage. This $10,000,000 accomplished the same purpose that a like sum would have done if paid by purchases of the fee, and the purposes of the grant were just as well accomplished in one mode of disposition of the lands as the other. Congress gave the lands—such is the language of the law—"for the purpose of aiding in the construction" of the road. The mortgagees have furnished the aid—$10,000,000. Their money has enabled the company to build the road and *earn* the lands. The mortgagees knew that the money paid was for the precise purposes for which the grant was made; they taking only the risk of the ability of the company to earn the lands with the aid of this money.

The mortgage provides that the bondholder may purchase lands and pay for them in bonds. He has the option to sustain the relation of a mortgagee or that of a purchaser. He has the right to refuse money and demand land in payment at the appraised value. Thus the instrument is more than a mortgage.

Then, in addition, the company in this case has received patents for half its lands, and has paid surveying fees, &c., on those unpatented. It has advertised its lands for sale and sold them; assuming thus and otherwise by its acts an absolute ownership. In these particulars, as in the one just mentioned, the case is distinguished from *Railway Company*

v. *Prescott*, so far as that case rests on the obligation to give pre-emption.

II. It is distinguishable also as respects the fees for surveying, &c.:

1. As respects the grant of 1864, the fees for surveying, &c., *have* been paid in all cases, and whether patent has issued or has not issued.

2. As respects the grant of 1862, these fees are not asked until after patent issues. The land department apparently does not construe as does this court the twenty-first section of the act of 1864, as applying to lands granted by the act of 1862. At all events it does not require prepayment of the fees for surveying as to lands granted by the act of 1862; lands within the ten-mile limit. The non-payment of these costs, therefore, is no impediment to the company's getting a patent. It is now the equitable owner of these unpatented lands, and so has a taxable interest in them. It is unimportant whether the patent was actually issued or not. The company had *earned* the lands.

The land department of the United States, indeed, refuses to give a patent for some of the lands, not because the surveying fees are not paid, as is required in regard to the lands granted by the act of 1864, undoubtedly (and as this court has decided as to those granted in 1862 also), but because the joint resolution of 1869 required that security should be got for the making of a certain sort of perfect road. But the joint resolution is not aimed at the lands. It requires that *subsidy* or *other bonds* shall be held as security for the expenditure, and, if they are not voluntarily given by the company, the Attorney-General is required to institute suits "to compel the giving *such* security." There is no intimation in the act that lands or patents are to be withheld as such security. The act of the land department in withholding patents is without authority. The commissioners had certified the road. The President had accepted it. Anything further between the company and the United States was matter for the courts.

The contingent rights in the United States, which in *Rail-*

way Company v. *Prescott* was held sufficient to exempt lands must—whether coming from the "pre-emption" cause, or from the right to retain for payment of costs of surveying, &c.—to the eye of a practical man, appear as applied to the present case but rights of a dim and shadowy sort.

How does the case stand?

1. As respects the United States.

It "granted" the lands to the company in 1862. It accepted the road as completed in 1869, thus declaring that the company had paid for—earned the lands. It issued patent for 640,000 acres in 1871; and received from the company the surveying, &c., on the lands not patented.

2. As respects the acts and declarations of the company.

It accepts the grants made by the United States. It declared, in 1869, that it had completed its entire road; thereby asserting it had earned and was entitled to the lands. It receives patents for a part of them, and pays the surveying fees, &c., on the residue. It mortgaged its grant for $10,000,000, and received the money and applied it to building the road. It exercised exclusive acts of ownership, by selecting, classifying, advertising them for sale and selling portions of its grant. It now asks the court to interfere by injunction to prevent, of course, a cloud being cast upon its titles.

Thus, both the United States and the company say that the lands belong to the company. Is not Nebraska then justified in so regarding them and in seeking to make them, as private property, bear a just proportion of the public burdens.

We submit that every consideration of equity and justice is in favor of the tax. How long, indeed, shall these immense bodies of land remain in the situation in which this company would place them? not under the control of the United States, so as to be open to settlement and cultivation, not owned by the company, so as to be subject to State taxation; but owned by it when it wants lenders on mortgage, or when it wants purchasers; owned by it for every *beneficial* purpose, but not owned for the purpose of bearing any share of the public burdens.

Even if the United States has some claim against the lands for surveying fees or anything else, it is difficult to see how it could be prejudiced by a sale of them for taxes. This court said in the case of *Carroll* v. *Safford*,*

"The sale for taxes is made on the presumption that the purchase from the government has been *bonâ fide*, and if not so made the purchaser at the tax sale acquires no title, and consequently no embarrassment can arise in the future disposition of the same land by the government."

A different view seems to have been taken in *Railway Company* v. *Prescott*. But this question is not involved here.

Reply:

The position of the other side is that the contingent preemption right in favor of settlers of the United States, protected by *Railway Company* v. *Prescott*, has been destroyed because the company has mortgaged the lands, and so "disposed of" them. But both the legal and the ordinary signification of these words import an absolute parting with all control over or reversionary interest in the lands. Neither a mortgage nor a *contract* of sale accomplishes such an alienation of interest and control. In both cases the company retain an interest in the thing mortgaged or contracted to be sold which may, upon the happening of certain events, revest a complete title in a part or of all the property. Suppose, after the execution of the mortgage, the company had got money, from subsidy bonds or from some other source, and had discharged the mortgage, not an acre of the land having been yet sold. Could it be contended that the simple making of the instrument of mortgage was such "disposition of" the land as would defeat the operation of the third section of the act of 1862?

If such an interpretation be accepted, then a mortgage, however inconsiderable, a contract to convey, with however irresponsible a party—and each with an absolute certainty

* 13 Howard, 462.

of reversion to the company of a title in fee—would operate to defeat the intent of Congress.

If, therefore, the purpose and object of Congress in framing the section under consideration, was that authoritatively declared by this court in the case of *Railway Company* v. *Prescott*, it is submitted with confidence that no form of conveyance, and no species of alienation of granted lands, which falls short of an unconditional parting with the control of and title to the same, either present or reversionary, legal or equitable, can operate to defeat the condition imposed by the section in question.

Therefore, certainly all the lands in controversy, patented or unpatented, not having been either "sold or disposed of" by the company, whether the three years from the date of the completion of the road have elapsed or not, are subject to the contingent right reserved by Congress in the section under consideration; and are, therefore, not subject to taxation.

And the same thing is true of all lands, whether patented or unpatented, upon which the costs of surveying, &c., have not yet been paid. The language of the statute of 1864 is absolute, and has been held by this court, in one part of the same case of *Railway Company* v. *Prescott*, to apply to the ten-mile grant of 1862 as well as to the twenty-mile grant of 1864. Otherwise, by a colorable conveyance, or by a contract of sale, the onerous terms of which would provide for and make sure a forfeiture, or by a mortgage for a sum so inconsiderable as to render redemption morally certain, the whole object of the provision would be easily defeated. Nor is the question modified by the circumstance that the mortgage is for a large sum; especially when it appears that the proceeds of the sales of the lands which are being made are pledged, and are being applied to the payment of the mortgage debt.

The mode adopted by the company for rendering the grant available for the purpose for which it was made must have been anticipated by Congress when passing the act. Sales of the lands before the road is built, and in quantities

such as to realize sums of much use in carrying forward the work, are known to be impossible. By means of a mortgage upon them, with a pledge to its redemption of the proceeds of the sales of the lands after their value has been greatly increased by the building of the road, the funds for the purpose can be raised, and they have never been raised by other means. With this knowledge, it is impossible to think that Congress, in the terms of the third section, intended to include a mortgage of the lands, and defeat the very important object of the clause, almost at the very moment of enacting it.

The construction contended for on the other side involves the matter in infinite confusion. This company is selling the lands and applying the proceeds to pay off the mortgage. If, by the sale of one-fourth thereof, the whole mortgage debt is paid, is there a disposition of the remaining three-quarters?

Mr. Justice MILLER delivered the opinion of the court.

We will take up, without restating them, the three several propositions which present the grounds on which the exemption from State taxation is claimed,* and in examining their legal bearing on the case will at the same time, where it is necessary, inquire how far they are supported by the facts of the case, and will then look into the other matters set up by way of defence.

The first and second of the propositions relied on by the railroad company are supposed to find sufficient support in the case of *Railway Company* v. *Prescott*.†

That was a suit by the Kansas Branch of the Union Pacific Railroad Company to have declared void a sale of some of its land for taxes, made under State authority, and this court granted the relief on the ground that the land was not liable to taxation at the time it was assessed for the taxes under which it had been sold. No patent had been issued to the company when the taxes were assessed, and

* Stated, *supra*, pp. 449, 450.—REP.

† 16 Wallace, 603.

the costs of surveying the land had not been paid to the government by any one. This court reaffirmed the doctrine that lands which had constituted a part of the public domain might be taxed by the States before the government had parted with the legal title by issuing a patent, but that this could only be done when the right to the patent was complete, and the equitable title fully vested in the party, without anything more to be paid, or any act to be done going to the foundation of his right. And it said that in that case the United States had a right to retain the patent until the costs of surveying the land had been paid, which had not been done, and that the right of pre-emption in lands unsold by the company within three years after completion of the road, would be defeated if a sale for State taxes could be made which would be valid.

This latter ground was not necessary to the judgment of the court, as it rested as well on the failure to pay the costs of surveying the land. And we are now of opinion, on a fuller argument and more mature consideration, that the proposition is not tenable.

The road was completed and accepted by the President in May, 1869, and these lands have been subject to such pre-emption since three years from that date, if this right can be exercised by the settler without further legislation by Congress, or action by the Interior Department. We do not now propose to decide whether any such legislation or other action is necessary, or whether any one, having the proper qualification, has the right to settle on these lands and, tendering to the company the dollar and a quarter per acre, enforce his demand for a title. It is not known that any such attempt has been made, or ever will be, or that Congress or the department has taken, or intends to take, any steps to invite or aid the exercise of this right. It would seem that if it exists, it would not be defeated by the issue of the patent to the company, and it may, therefore, remain the undefined and uncertain right, vested in no particular person or persons, which it now is, for an indefinite period of time. The company, meantime, obtains the title, sells

the lands when a good offer is made, and exercises all the other acts of full ownership over them, without the liability to pay taxes.

We are of opinion, therefore, that this right confers no exemption from taxation, whether the land be patented or not; and so far as the opinion in the case of *Railway Company* v. *Prescott* asserts a different doctrine, it is overruled.

But the proposition that the State cannot tax these lands while the cost of surveying them is unpaid, and the United States retains the legal title, stands upon a different ground.

The act of 1864, section twenty-one, declares that before any of the lands granted by this act shall be conveyed to the company, there shall first be paid into the treasury of the United States the cost of surveying, selecting, and conveying the same.

That the payment of these costs of surveying the land is a condition precedent to the right to receive the title from the government, can admit of no doubt. Until this is done, the equitable title of the company is incomplete. There remains a payment to be made to perfect it. There is something to be done without which the company is not entitled to a patent. The case, clearly, is not within the rule which authorizes State taxation of lands the title of which is in the United States.

The reason of this rule is also fully applicable to this case. The United States retains the legal title by withholding the patent, for the purpose of securing the payment of these expenses, and it cannot be permitted to the States to defeat or embarrass this right by a sale of the lands for taxes. If such a sale could be made, it must be valid if the land is subject to taxation, and the title would pass to the purchaser. If no such title could pass, then it is because the land is not liable to the tax; and the treasurers of the counties have no right to assess it for that purpose.

But when the United States parts with her title, she has parted with the only means which that section of the statute gives for securing the payment of these costs.

It is by retaining the title that the payment of costs of survey is to be enforced. And so far as the right of the State to tax the land is concerned, we are of opinion that when the original grant has been perfected by the issue of the patent, the right of the State to tax, like the right of the company to sell the lands, has become perfect.

It is admitted that part of the lands in dispute have been patented, and part of them have not. And the circuit judge in his opinion and decree divides them into the patented and the unpatented lands, and we concur in his opinion that there is no reason why the patented lands should not be taxed.

As to those which are not patented, it may be assumed from the evidence in the case that on none of them have the costs of survey been paid or tendered to the United States, and if they are all subject to that provision of the act of 1864 they are not liable, on the principle we have stated, to be taxed. It is said, however, by counsel for the State, that the Interior Department has never demanded the costs of surveying the lands within the original ten-mile limit, in cases in which they *have* issued patents, and do not claim them in those for which no patent has been issued; that as the non-payment of these costs, therefore, is no impediment to demanding and receiving the patents, the equitable title is complete, and they should be held subject to taxation.

We held, however, in the case of *Railway Company* v. *Prescott*, that these costs of survey attached to all the lands granted to the road, whether by the original act or by the amendatory act of 1864, and we have no sufficient evidence before us that the Department of the Interior has acted on a different principle. If, however, they have done so heretofore, it is not for us to say that they *will* grant patents *hereafter* without payment of these costs; and in a case where we are called on to decide whether such costs are lawfully demandable before the legal title of the company is perfect, we must abide by our own construction of the statute.

It is said, however, that these lands have been mortgaged

by the company under sanction of the act of Congress on that subject, and that the mortgage conveys the legal title out of the United States, so that her rights can no longer be interposed to protect them from taxation.

It is not necessary to go into the merely technical question whether the legal title passed from the United States by virtue of that mortgage and the act of Congress which authorized it, nor whether, if it ever becomes necessary to foreclose that mortgage, the rights of the United States in the land would be divested by the proceeding, because we are satisfied that the United States, until she conveys them by patent or otherwise, has an interest, whether it be legal or equitable, which the State of Nebraska is not at liberty to divest by the exercise of the right of taxation.

Under these views we are of opinion that the State had no right to tax the lands for which the cost of surveying had not been paid, and for which no patent had been issued; and as the decree of the Circuit Court was made in conformity with these principles, it is

AFFIRMED.

HUNNEWELL v. CASS COUNTY.

1. Under the act of July 2d, 1864 (13 Stat. at Large, 364), which gave to the Burlington and Missouri River Railroad Company every alternate section of the public lands, to the amount of ten alternate sections per mile on each side of the road on the line thereof, but enacted in its twenty-first section that "before any land granted by this act shall be conveyed to the said company there shall first be paid into the *Treasury of the United States* the *cost of surveying, selecting, and conveying* the same by the said company," it is not clear what the "cost of conveying" is, no statute known to the court authorizing a charge or fee for issuing a patent. Nor is it clear whether, under the terms the "cost of selecting and conveying," the fees of $1 for each final *location* of one hundred and sixty acres, given to *registers and receivers* by the act of Congress of July 1st, 1864 (13 Stat. at Large, 365), is meant or not.
2. Nor under the General Statute 907, of the State of Nebraska, is it plain what is the latest day at which by the laws of that State the right to assess lands for taxation can be exercised for any given year.